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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9789]

RIN 1545-BM03

Election to Take Disaster Loss Deduction for Preceding Year

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and temporary regulations.

SUMMARY: This document contains final and temporary regulations relating to the election to accelerate the timing of a loss sustained by a taxpayer attributable to a federally declared disaster. The text of the temporary regulations also serves as the text of the proposed regulations (REG-150992-13) set forth in the notice of proposed rulemaking on this subject in the Proposed Rules section in this issue of the **Federal Register**.

DATES: Effective Date: These regulations are effective October 13, 2016.

Applicability Dates: For dates of applicability, see §1.165-11T(i).

FOR FURTHER INFORMATION CONTACT: Daniel Cassano (202) 317-7011 (not a toll free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains amendments to the Income Tax Regulations (26 CFR part 1) under section 165(i) of the Internal Revenue Code (Code) regarding the election to deduct a loss attributable to a federally declared disaster for the taxable year prior to the year in which the disaster occurred.

Under section 165, a loss from a federally declared disaster is a form of casualty loss. A casualty loss is generally allowed as a deduction only for the taxable year in which the loss is sustained (disaster year). Section 165(i) provides an exception to the general timing rule by allowing a taxpayer to elect to treat an allowable loss occurring in a disaster area and attributable to a federally declared disaster as sustained in the taxable year immediately prior to the taxable year in which the disaster occurred (preceding year).

Taxpayers make the election under section 165(i) by clearly indicating on an original return, an amended return, or a refund claim, that the election has been made. The existing regulations under section 165(i) provide that the original return, amended return, or refund claim must be filed on or before the later of: (1) the due date of the taxpayer's income tax return (determined without regard to any extension of time for filing the return) for the disaster year; or (2) the due date of the taxpayer's income tax return (determined with regard to any extension of time for filing the return) for the preceding year. Thus, taxpayers typically have until the unextended due date of the return for the disaster year to make the section 165(i) election.

Concerns have been raised that the due date for making the section 165(i) election may not always provide sufficient time for taxpayers affected by disasters to

consider whether to make the election. These concerns led the Department of the Treasury (Treasury Department) and the IRS to issue notices postponing the due date in the wake of a number of federally declared disasters in the last ten years. Notice 2006-17, 2006-1 C.B. 559, postponed the due date for victims of Hurricanes Katrina, Rita, and Wilma to make a section 165(i) election for their disaster losses to October 16, 2006. Notice 2013-21, 2013-15 I.R.B. 903, postponed the due date for victims of Hurricane Sandy to make a section 165(i) election for their disaster losses to October 15, 2013. Notice 2014-20, 2014-16 I.R.B. 937, postponed the due date for victims of a major Colorado flooding event to make a section 165(i) election for their disaster losses to October 15, 2014.

Explanation of Provisions

1. Definitions

These temporary regulations add a paragraph that defines the following terms for purposes of the temporary regulations: federally declared disaster; federally declared disaster area; disaster loss; disaster year; and preceding year. A federally declared disaster means any disaster subsequently determined by the President of the United States to warrant assistance by the Federal Government under the Robert T. Stafford Disaster Relief and Emergency Assistance Act or a successor enactment. A federally declared disaster area is the area determined to be eligible for assistance pursuant to the Presidential declaration in paragraph (b)(1) of the section. A disaster loss is a loss occurring in a federally declared disaster area that is attributable to a federally declared disaster and that is otherwise allowable as a deduction for the

disaster year under section 165(a) and §§1.165-1 through 1.165-10 of the Income Tax Regulations. The disaster year is defined as the taxable year in which a taxpayer sustains a loss attributable to a federally declared disaster. The preceding year is the taxable year immediately prior to the disaster year.

2. Time and Manner of Making the Section 165(i) Election

These temporary regulations generally provide that the due date for making the section 165(i) election is six months after the due date for filing the taxpayer's federal income tax return for the disaster year (determined without regard to any extension of time to file). This amount of time is comparable to the length of the postponements of the due dates for making the election granted in the notices identified in the Background section of this preamble.

These temporary regulations also authorize the Treasury Department and the IRS to issue additional guidance regarding the time and manner for making the section 165(i) election. The authorization in these temporary regulations will permit the Treasury Department and the IRS to act quickly to adapt to both taxpayer needs and the needs of tax administration as future disasters occur.

Contemporaneously with these temporary regulations, the Treasury Department and the IRS are issuing Rev. Proc. 2016-53, I.R.B 2016-44, which specifies how a taxpayer makes a section 165(i) election and incorporates the due date for making the election provided in these temporary regulations.

3. Revocations of a Section 165(i) Election

These temporary regulations extend the period of time for revoking a section

165(i) election to ninety (90) days after the due date for making the election. This change conforms to the rule established by the United States Tax Court in Matheson v. Commissioner, 74 T.C. 836 (1980), acq., AOD-1980-177. These temporary regulations also authorize the Treasury Department and the IRS to issue additional guidance regarding the time and manner of revoking the election. Rev. Proc. 2016-53 specifies how a taxpayer revokes a section 165(i) election and incorporates the due date for revoking the election provided in these temporary regulations.

4. Consistent Return Positions

These temporary regulations reflect rules established elsewhere in federal tax law that a taxpayer cannot deduct the same loss in more than one taxable year. Taxpayers must amend the return for the disaster year in order to make the section 165(i) election for a disaster loss if the taxpayer has deducted such loss for the disaster year. Similarly, taxpayers must amend the preceding year return to revoke a section 165(i) election before filing a return or amended return to deduct the loss in the disaster year. Rev. Proc. 2016-53 contains further guidance for taxpayers in amending returns and taking consistent return positions to minimize the administrative burden on the IRS in ensuring the prompt processing of refunds.

5. Immediate Effect

These temporary regulations are effective immediately because they provide relief to taxpayers who suffer casualty losses attributable to federally declared disasters and the Treasury Department and the IRS anticipate a significant number of casualty losses arising from recent instances of flooding in areas located throughout the United

States, including Texas and Louisiana.

Special Analyses

Certain IRS regulations, including these, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13563. Therefore, a regulatory impact assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. For applicability of the Regulatory Flexibility Act (5 U.S.C. chapter 6), please refer to the cross-referencing notice of proposed rulemaking published in the Proposed Rules section in this issue of the **Federal Register**. Pursuant to section 7805(f) of the Code, these temporary regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Drafting Information

The principal authors of these regulations are Daniel Cassano and Christopher Wrobel of the Office of the Associate Chief Counsel (Income Tax & Accounting). However, other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1-- INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 1.165-11 is revised to read as follows:

§1.165-11 Election in respect of losses attributable to a disaster.

(a) through (j) [Reserved]. For further guidance, see §1.165-11T(a) through (j).

Par. 3. Section 1.165-11T is added to read as follows:

§1.165-11T Election to take disaster loss deduction for preceding year (temporary).

(a) In general. Section 165(i) allows a taxpayer who has sustained a loss attributable to a federally declared disaster in a taxable year to elect to deduct that disaster loss in the preceding year. This section provides rules and procedures for making and revoking an election to claim a disaster loss in the preceding year.

(b) Definitions. The following definitions apply for purposes of this section:

(1) A federally declared disaster means any disaster subsequently determined by the President of the United States to warrant assistance by the Federal Government under the Robert T. Stafford Disaster Relief and Emergency Assistance Act or a successor enactment.

(2) A federally declared disaster area is the area determined to be eligible for assistance pursuant to the Presidential declaration in paragraph (b)(1) of this section.

(3) A disaster loss is a loss occurring in a federally declared disaster area that is attributable to a federally declared disaster and that is otherwise allowable as a deduction for the disaster year under section 165(a) and §§1.165-1 through 1.165-10.

(4) The disaster year is the taxable year in which a taxpayer sustains a loss attributable to a federally declared disaster.

(5) The preceding year is the taxable year immediately prior to the disaster year.

(c) Scope and effect of election. An election made pursuant to section 165(i) for a disaster loss attributable to a particular disaster applies to the entire loss sustained by the taxpayer from that disaster during the disaster year. If the taxpayer makes a section 165(i) election with respect to a particular disaster occurring during the disaster year, the disaster to which the election relates is deemed to have occurred, and the disaster loss to which the election applies is deemed to have been sustained, in the preceding year.

(d) Requirement to file consistent returns. A taxpayer may not make a section 165(i) election for a disaster loss if the taxpayer claims a deduction (as a loss, as cost of goods sold, or otherwise) for the same loss for the disaster year. If a taxpayer has claimed a deduction for a disaster loss for the disaster year and the taxpayer wishes to make a section 165(i) election with respect to such loss, the taxpayer must file an amended return to remove the previously deducted loss on or before the date that the taxpayer makes the section 165(i) election for such loss. Similarly, if a taxpayer has claimed a deduction for a disaster loss for the preceding year based on a section 165(i) election and the taxpayer wishes to revoke that election, the taxpayer must file an amended return to remove the loss for the preceding year on or before the date the taxpayer files the return or amended return for the disaster year that includes the loss.

(e) Manner of making election. An election under section 165(i) to deduct a

disaster loss for the preceding year is made on an original federal tax return for the preceding year or an amended federal tax return for the preceding year in the manner specified by guidance issued pursuant to these regulations. See paragraph (h) of this section.

(f) Due date for making election. The due date for making the section 165(i) election is six months after the due date for filing the taxpayer's federal income tax return for the disaster year (determined without regard to any extension of time to file).

(g) Revocation. Subject to the requirements in paragraph (d) of this section, a section 165(i) election may be revoked on or before the date that is ninety (90) days after the due date for making the election.

(h) Additional guidance. The time and manner for making and revoking a section 165(i) election under paragraphs (d), (e), (f), and (g) of this section may be modified through guidance published in the **Federal Register** or in the Internal Revenue Bulletin (see §601.601(d) of this chapter).

(i) Effective/applicability date. This section is effective October 13, 2016 and applies to elections, revocations, and any other related actions that can be made or taken on or after October 13, 2016.

(j) Expiration date. The section expires October 13, 2019.

John Dalrymple,

Deputy Commissioner for Services and Enforcement.

Approved: September 19, 2016.

Mark J. Mazur,

Assistant Secretary of the Treasury (Tax Policy).

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